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HEDONIC DAMAGES IN SECTION 1983 ACTIONS: A REMEDY FOR THE UNCONSTITUTIONAL DEPRIVATION OF LIFE

Section 1983 of title 42 of the United States Code¹ provides a federal cause of action for violations of a person's federally protected civil rights.² Litigation involving claims under section 1983 has increased dramatically in recent years.³ Damage awards for successful plaintiffs in section 1983 actions are often substantial and provide a lucrative incentive to pursue a section 1983 claim.⁴ A plaintiff bringing a section 1983 action must show that some

1. 42 U.S.C. § 1983 (1982). Section 1983 of title 42 of the United States Code provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.; see *infra* note 2 and accompanying text (discussing purpose of § 1983); *infra* note 4 and accompanying text (noting examples of § 1983 claims and damage awards in § 1983 actions); *infra* note 5 and accompanying text (defining § 1983 terms "person," and "under color of law").

2. 42 U.S.C. § 1983 (1982); see *Gomez v. Toledo*, 446 U.S. 635, 638 (1980) (§ 1983 protects people's liberties and rights); *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 685 (1978) (§ 1983 is remedy for violations of civil rights); *Mitchum v. Foster*, 407 U.S. 225, 238-39 (1972) (§ 1983 empowers federal courts as guardians of people's constitutional rights); *Monroe v. Pape*, 365 U.S. 167, 171 (1961) (§ 1983 enforces provisions of fourteenth amendment). Congress passed the prior version of § 1983, the Ku Klux Klan Act of 1871 (Klan Act), in response to President Grant's March 23, 1871, message to Congress in which President Grant recommended that Congress pass legislation to curb the rampant violations of life, liberty, and property occurring at the time. See *Monroe*, 365 U.S. at 171-73 (discussing provisions of Klan Act); Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13 (current version of § 1 of Klan Act at 42 U.S.C. § 1983 (1982)). The official title of the Klan Act denotes that the act enforces the provisions of the fourteenth amendment to the United States Constitution. Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13; see *Monroe*, 365 U.S. at 171 (discussing purpose of Klan Act); see also *infra* note 6 and accompanying text (noting provisions of fourteenth amendment to United States Constitution). In *Monell*, the United States Supreme Court noted that Congress enacted § 1 of the Klan Act to provide a "broad remedy" for violations of individuals' civil rights. *Monell*, 436 U.S. at 685; Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13; see *infra* note 5 and accompanying text (defining § 1983 terms "persons," and "color of law,"); *infra* notes 19-23 and accompanying text (discussing compensatory and deterrent purposes of § 1983).

3. See *Patsy v. Board of Regents of Florida*, 457 U.S. 496, 533 & n.20 (1982) (Powell, J., dissenting) (expressing concern over tremendous increase in number of civil rights actions and burden that these often trivial cases place on federal courts); *Parratt v. Taylor*, 451 U.S. 527, 553-54 & n.13 (1981) (Powell, J., concurring) (noting increasing § 1983 litigation and suggesting revision and clarification of purpose of § 1983); Love, *Damages: A Remedy For the Violation of Constitutional Rights*, 67 CALIF. L. REV., 1242, 1242 & n.6 (1979) (discussing rise in number of § 1983 actions). In 1960, plaintiffs filed 280 § 1983 lawsuits. *Id.* The number of § 1983 lawsuits increased from 3,985 in 1970, to 12,313 in 1977. *Id.*

4. See *Blackburn v. Snow*, 771 F.2d 556, 559 & 571-73 (1st Cir. 1985) (awarding

person acting under color of state law deprived the plaintiff of a constitutional or federal statutory right.⁵ The fourteenth amendment to the United

\$177,040 damages for physical and psychological problems arising from unconstitutional body cavity strip search); *Clark v. Taylor*, 710 F.2d 4, 10-14 (1st Cir. 1983) (awarding \$60,000 compensatory and \$15,000 punitive damages for injuries caused when crime lab officials used chemical tests involving known carcinogens on plaintiff's skin); *Green v. Francis*, 705 F.2d 846, 850 (6th Cir. 1983) (awarding \$63,000 damages for failure of sheriff's department to respond to terrorism committed against black family's property); *Grimm v. Leinart*, 705 F.2d 179, 183 (6th Cir. 1983) (awarding \$60,000 damages for false arrest, false imprisonment, and damage to reputation), *cert. denied*, 465 U.S. 1066 (1984); *Thomas v. City of New Orleans*, 687 F.2d 80, 82 & 84 (5th Cir. 1982) (awarding \$50,000 punitive damages for wrongful discharge from police department).

5. See 42 U.S.C. § 1983 (1982). In *Gomez v. Toledo*, the United States Supreme Court maintained that a plaintiff in a § 1983 action must allege only that some person deprived the plaintiff of a federal right and that the person acted under color of state law. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). The eleventh amendment to the United States Constitution bars suits against a state in federal court by citizens of another state or citizens of the defendant state. U.S. CONST. amend. XI (barring citizen of one state from filing action against another state in federal court); *Hans v. Louisiana*, 134 U.S. 1, 9-21 (1889) (citizen of defendant state cannot file suit against defendant state in federal court). For the purposes of § 1983, the term "person" does not include a state, a state agency, or a state official. See *Quern v. Jordan*, 440 U.S. 332, 337-49 (1979) (state agency not "person" under § 1983); *Edeman v. Jordan*, 415 U.S. 651, 663 (1974) (state officials sued in official capacity for monetary relief entitled to invoke sovereign immunity). Although the eleventh amendment bar of actions in federal courts against states includes state officials that a plaintiff sues in official capacity, the Supreme Court has held that plaintiffs may sue state officials in federal court for injunctive relief or for a declaratory order compelling compliance with the United States Constitution. *Ex parte Young*, 209 U.S. 123, 159-68 (1908). Municipalities or local government entities, municipal officials, and natural persons, however, are "persons" under § 1983. See *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690 (1978). In *Monell*, the United States Supreme Court overruled the portion of the Court's decision in *Monroe v. Pape* in which the Court held that a municipal entity was not a "person" under § 1983. *Monell*, 436 U.S. at 701; see *Monroe v. Pape*, 365 U.S. 167, 187 (1961) (municipalities not "persons" for purposes of § 1983). See generally Schwartz, *Section 1983 Civil Rights Litigation*, in SECTION 1983 CIVIL RIGHTS LITIGATION 1985 11, 67-68, 94-109 (1985) (discussing § 1983 term "person" and discussing state liability in § 1983 actions); CIVIL ACTIONS AGAINST STATE GOVERNMENT §§ 10.3-10.7 (W. Winborne, ed. 1982) [hereinafter CIVIL ACTIONS] (defining "person" under § 1983).

In *Monroe v. Pape*, the United States Supreme Court maintained that a wrongdoer who has abused powers state law vests in the wrongdoer is a person acting under color of state law for the purposes of § 1983. *Monroe*, 365 U.S. at 184. The *Monroe* Court used the phrase "clothed with the authority of state law" to describe a person acting under color of state law. *Id.* See generally Schwartz, *supra* at 69-84 (discussing § 1983 term "under color of law"); CIVIL ACTIONS, *supra* at § 10:11-10:13 (discussing § 1983 term "under color of law").

Section 1983 provides enforcement of the fourteenth amendment to the United States Constitution. See *supra* note 2 and accompanying text (discussing purposes of section 1983); *infra* note 6 and accompanying text (discussing provisions of fourteenth amendment). The Supreme Court has held that the first, fourth, fifth (except the Grand Jury clause), sixth, and eighth amendments to the United States Constitution apply to the states through the fourteenth amendment. See, e.g., *Fiske v. Kansas*, 274 U.S. 380, 382-87 (1927) (incorporating first amendment freedom of speech under fourteenth amendment); *Mapp v. Ohio*, 367 U.S. 643, 660 (1961) (incorporating fourth amendment protection against unreasonable search and seizure under fourteenth amendment); *Benton v. Maryland*, 395 U.S. 784, 794-96 (1969) (incorporating fifth amendment protection against double jeopardy under fourteenth amendment); *Klopper v.*

States Constitution protects life.⁶ Unconstitutional deprivations of life by persons acting under color of state law, therefore, are actionable under section 1983.⁷ Although section 1983 provides a cause of action for deprivations of constitutional rights, section 1983 does not include provisions for the survival of a cause of action for the benefit of a decedent's estate when the decedent dies after the cause of action has accrued, or when a decedent's death directly results from a violation of the decedent's constitutional rights.⁸ Section 1988 of title 42 of the United States Code,⁹ however, provides procedural guidelines for section 1983 actions.¹⁰ Section 1988 refers the federal district courts to state law when federal law fails to carry out the

North Carolina, 386 U.S. 213, 222-26 (1967) (incorporating sixth amendment right to speedy trial under fourteenth amendment); *Robinson v. California*, 370 U.S. 660, 667 (1962) (incorporating eighth amendment freedom from cruel and unusual punishment under fourteenth amendment); *see also* CIVIL ACTIONS, *supra*, § 10.9 (discussing enforcement of constitutional amendments).

6. U.S. CONST. amend. XIV, § 1. Section 1 of the fourteenth amendment to the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law." *Id.*; *see infra* note 7 and accompanying text (discussing protection of life that fourteenth amendment provides individuals).

7. *See, e.g.*, *Taylor v. Collins*, 574 F. Supp. 1554, 1559-63 (E.D. Mich. 1983) (§ 1983 action appropriate for case in which police shot and killed individual without probable cause); *Hamrick v. Lewis*, 515 F. Supp. 983, 987 (N.D. Ill. 1981) (§ 1983 cause of action when police shot and killed individual who was attempting to destroy evidence); *Phillips v. Ward*, 415 F. Supp. 976, 979-80 (E.D. Pa. 1975) (section 1983 action valid when police shot and killed fleeing burglar when police had opportunity to effect arrest without deadly force). Many deprivations of life, however, are not unconstitutional and therefore, are not actionable under § 1983. *See, e.g.*, *Qualls v. Parrish*, 534 F.2d 690, 694-95 (6th Cir. 1976) (police officers not liable under § 1983 for shooting kidnapping suspect after suspect attempted to run over officers with automobile); *Willis v. Tillrock*, 421 F. Supp. 368, 372 (N.D. Ill. 1976) (police officer not liable under § 1983 for killing burglary suspect when suspect lunged at police officer in dark area); *Smith v. Jones*, 379 F. Supp. 201, 204 (M.D. Tenn. 1973) (police not liable under § 1983 for killing attempted murder suspect after suspect attempted to run over police officer with automobile), *aff'd without opinion*, 497 F.2d 924 (6th Cir. 1974).

8. *See* 42 U.S.C. § 1983 (1982); *supra* notes 1-5 and accompanying text (discussing § 1983); *infra* notes 12-13 and accompanying text (discussing survival of § 1983 actions for decedent's estate).

9. 42 U.S.C. § 1988 (1982). Section 1988 of title 42 of the United States Code provides in pertinent part:

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, . . . same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause. . . .

Id.

10. *See id.* (providing provisions of § 1988).

purposes of section 1983, unless the state law is inconsistent with the United States Constitution or federal law.¹¹ The United States Supreme Court has held that under section 1988, state survival of action statutes determine the survival of section 1983 claims when a plaintiff dies after a plaintiff's section 1983 cause of action has accrued.¹² The United States Supreme Court has yet to decide, however, whether a state statute may bar a section 1983 action arising when the decedent's death is the result of the defendant's unconstitutional activity.¹³

11. 42 U.S.C. § 1988 (1982); *see supra* note 9 and accompanying text (noting provisions of § 1988); *see also* *Robertson v. Wegmann*, 436 U.S. 584, 588 (1978) (§ 1988 governs survival of § 1983 actions); *Carey v. Phipus*, 435 U.S. 247, 258 n.13 (1978) (noting that § 1988 authorizes federal courts to adopt state law for § 1983 remedies); *McDonald v. Verble*, 622 F.2d 1227, 1234-35 (6th Cir. 1980) (§ 1983 rule of damages, even if federal court adopts damage remedy from state law, is federal rule to redress violations of federal rights).

12. *See Robertson*, 436 U.S. at 584-95 (state survival of action statutes determine survival of § 1983 actions). In *Robertson*, the United States Supreme Court considered whether a decedent's § 1983 claim arising from bad faith prosecution survived the decedent's death. *Id.* at 586-88. The decedent's cause of action for bad faith prosecution arose before the decedent's death and the bad faith prosecution did not contribute to the decedent's death in any way. *Id.* Noting that § 1988 requires federal courts to apply state survival law for § 1983 actions unless the state law interferes with the policies of section 1983, the Supreme Court held that the survival laws in the state where the decedent's cause of action arose did not interfere with the policies of § 1983, even though the state law prohibited the survival of bad faith prosecution claims. *Id.* at 590-95. The *Robertson* Court refused, however, to decide whether state survival law could cause a § 1983 action that arose from a constitutional deprivation to abate. *Id.* at 594; *see infra* notes 13-15 and accompanying text (discussing survival of § 1983 actions arising from unconstitutional deprivation of decedent's life). State survival statutes provide for the survival of a decedent's cause of action for the benefit of a decedent's estate after the death of the decedent. *See* 2 S. SPEISER, *RECOVERY FOR WRONGFUL DEATH* § 14.1 (2d ed. 1975) (discussing survival of action laws). Under the legal fiction of state survival statutes, a decedent's estate stands in the place of the decedent collecting the debts the decedent is owed. *Id.* State wrongful death statutes generally provide recovery for a decedent's survivors' losses resulting from the decedent's death. *See id.* (providing an exhaustive review of state wrongful death and survival statutes and the claims allowed under these statutes).

13. *See Jones v. Hildebrant*, 432 U.S. 183, 184-89 (1977) (dismissing certiorari as improvidently granted because questions presented to the Court differed from questions raised at oral argument). In *Jones*, the United States Supreme Court considered whether a state damage recovery limitation could limit § 1983 damages for an action arising from the unconstitutional deprivation of the decedent's life. *Id.* The petitioner in *Jones*, the mother of the decedent police wrongfully killed, sought damages for the loss of her son's life. *Id.* The *Jones* Court found, however, that the petitioner's question presented at oral argument before the Court concerned the decedent's mother's loss of her child's right to raise the child, while the petition for certiorari to the Court presented a question concerning damages for the deprivation of the decedent's life. *Id.* Finding that the question presented at oral argument was not the same question which petitioner's counsel presented in the petition for certiorari, the *Jones* Court dismissed certiorari as improvidently granted and refused to decide the relationship between state law and § 1983. *Id.*

The dissent in *Jones* called for resolution of the questions surrounding the applicability of state survival statutes and damage remedies in § 1983 actions arising from unconstitutional deprivations of life. *Id.* at 189-96 (White, J., dissenting); *see also* *Carlson v. Green*, 446 U.S. 14, 25-30 (1980) (Powell, J. concurring) (intimating that state survival law should not prohibit

Although the United States Supreme Court has not clarified the survivability of section 1983 actions arising from an unconstitutional deprivation of a person's life, several federal courts have decided that state statutes cannot bar a section 1983 action arising from unconstitutional activity that results in a person's death.¹⁴ Finding that neither federal nor state law provides an adequate damage remedy that reflects on the value of a decedent's life, some federal courts have fashioned damages for the value of a decedent's life in section 1983 actions arising from an unjustified deprivation of a person's life.¹⁵ The federal courts that have fashioned damages for the value of a decedent's life have followed the United States Supreme Court decision in *Carey v. Phipus*,¹⁶ which authorized federal courts to fashion remedies that are appropriate to the particular injury in section 1983 actions.¹⁷ The *Carey* Court considered a section 1983 claim that arose when a public secondary school principal suspended a student without procedural due process, in violation of the fourteenth amendment to the United States Constitution.¹⁸ The plaintiff in *Carey* maintained that

§ 1983 claim when § 1983 action arises from unconstitutional deprivation of decedent's life); *supra* note 12 and accompanying text (discussing state survival statutes and survival of § 1983 claims).

14. *See e.g.*, *Rosa v. Cantrell*, 705 F.2d 1208, 1220-24 (10th Cir. 1982) (state law cannot prohibit § 1983 actions when § 1983 cause of action arises from decedent's death), *cert. denied*, 464 U.S. 821 (1983); *Sager v. City of Woodland Park*, 543 F. Supp. 282, 292-97 (D. Colo. 1982) (state law only may expand, not restrict, § 1983 remedies); *Larson v. Wind*, 542 F. Supp. 25, 26-27 (N.D. Ill. 1982) (state law cannot interfere with survival of § 1983 remedies when unconstitutional conduct causes death); *O'Conner v. Several Unknown Correctional Officers*, 523 F. Supp. 1345, 1347-49 (E.D. Va. 1981) (state law cannot deny recovery in § 1983 action for injuries deprivation of decedent's life causes); *see also infra* note 15 and accompanying text (noting federal courts that have mandated survival of and have fashioned remedies in § 1983 actions arising from unconstitutional deprivations of life); Annotation, *Survivability of Civil Rights Cause of Action Based on 42 U.S.C.S. § 1983*, 42 A.L.R. FED. 163, 172-78 (1979 & Supp. 1985) (discussing survival of § 1983 actions when plaintiff is dead).

15. *See, e.g.*, *Bell v. City of Milwaukee*, 746 F.2d 1205, 1240 (7th Cir. 1984) (fashioning loss of life and loss of pleasure of living damage remedy in § 1983 action); *Sherrod v. Berry*, 629 F. Supp. 159, 163-64 (N.D. Ill. 1985), (fashioning "hedonic damages" in § 1983 action) *appeal docketed*, No. 85-3151 (7th Cir. Dec. 12, 1985); *Roman v. City of Richmond*, 570 F. Supp. 1554, 1556-58 (N.D. Cal. 1983) (fashioning "deterrent damages" in § 1983 action); *Guyton v. Phillips*, 532 F. Supp. 1154, 1167-68 (N.D. Cal. 1981) (fashioning loss of life damages in § 1983 action); *see also infra* notes 56-103 and accompanying text (discussing federal courts that have fashioned loss of life damage remedies in § 1983 actions).

16. 435 U.S. 247 (1978).

17. *Id.* at 258-59; *see Bell v. Hood*, 327 U.S. 678, 684-85 (1946) (maintaining that federal courts should use any remedy available to redress violations of federally protected rights); *infra* notes 56-103 and accompanying text (discussing adoption of loss of life damages in § 1983 actions).

18. *Carey v. Phipus*, 435 U.S. at 248-51. In *Carey* the United States Supreme Court consolidated two § 1983 cases. *Id.* In the first case, a high school principal suspended respondent Phipus when the principal suspected Phipus of smoking marijuana on school grounds. *Id.* In the second case, a grade school principal suspended respondent Brisco for wearing an earring in school. *Id.* Both respondents in *Carey* alleged that the school authorities violated the fourteenth amendment by suspending the respondents without due process of law. *Id.*

substantial damages are appropriate in a constitutional deprivation action, regardless of whether the plaintiff suffered actual injury.¹⁹ Reasoning that the primary purpose of section 1983 is compensation for actual injury, the *Carey* Court rejected the plaintiff's argument.²⁰ The *Carey* Court noted that substantial compensatory damages for actual injury also fulfill the section 1983 purpose of deterrence.²¹ In addition, the Supreme Court in *Carey* recognized that common law tort remedies may not always provide adequate compensation in section 1983 actions.²² The *Carey* Court, therefore, maintained that when existing federal and state law remedies are inadequate, federal courts should fashion remedies in section 1983 actions to advance the section 1983 policies of compensation and deterrence.²³

The decision of the United States District Court for the Northern District of Illinois in *Sherrod v. Berry*²⁴ provides an example of a federal court fashioning a remedy in a section 1983 action that arose from an unjustified deprivation of a decedent's life.²⁵ In *Sherrod*, the district court allowed the jury to award damages for the "hedonic value" of the decedent's life.²⁶ The *Sherrod* court is apparently the first United States court to describe a damage award for the value of a decedent's life as damages for the hedonic value of a decedent's life.²⁷ The purpose of hedonic damages is to compensate a decedent's estate for the decedent's loss of life and loss of the pleasure of living.²⁸ The *Sherrod* court, therefore, recognized as actual injury the loss of life and loss of the pleasure of living that a decedent sustains when a wrongdoer unconstitutionally deprives the decedent of life.²⁹

Although the term "hedonic damages" is novel in American jurisprudence, English courts for many years have awarded a distinct element of damages commonly known as loss of expectation of life damages.³⁰ Beginning with the decision of the House of Lords in *Rose v. Ford*,³¹ English courts interpreted section 1 of the Law Reform (Miscellaneous Provisions)

19. *Id.* at 254.

20. *Id.* at 254-57.

21. *Id.*

22. *Id.* at 258-59.

23. *Id.*

24. 629 F. Supp. 159 (N.D. Ill. 1985), *appeal docketed*, No. 85-3151 (7th Cir. Dec. 12, 1985).

25. *Id.* at 162-64; *see infra* notes 81-103 and accompanying text (discussing *Sherrod*).

26. *Sherrod v. Berry*, 629 F. Supp. at 162-64.

27. *See* Blodgett, *Hedonic Damages*, 71 A.B.A.J. 25, 25 (February, 1985) (noting first use of hedonic damages in *Sherrod v. Berry*); Tarr, *Illinois Jury Awards 'Hedonic Damages'*, NAT'L L.J., Nov. 26, 1984, at 3, col. 1 (discussing decision in *Sherrod v. Berry* and first use of hedonic damages).

28. *See Sherrod*, 629 F. Supp. at 162-64 (defining hedonic damages); *infra* text accompanying notes 92-96 (discussing term "hedonic damages" in *Sherrod v. Berry*).

29. *See Sherrod*, 629 F. Supp. at 164 (discussing damages for hedonic value of life).

30. *See infra* notes 30-44 and accompanying text (discussing English courts' experience with loss of expectation of life damages).

31. *Rose v. Ford*, [1937] A.C. 826.

Act of 1934³² as allowing loss of expectation of life as a separate damage award for a decedent's estate when a tortfeasor wrongfully curtailed a decedent's life.³³ In subsequent decisions, English courts limited damage awards for loss of expectation of life to a nominal amount.³⁴ For example, in *Gammell v. Wilson*,³⁵ the Court of Appeal stated that £ 1250 was the proper award for loss of expectation of life, until inflation and monetary values demanded another increase.³⁶ The arbitrary figure of £ 1250 in *Gammell* reflected the English courts' difficulty in assessing the value of human life.³⁷ The *Gammell* court, therefore, settled on a conventional sum for

32. Law Reform (Miscellaneous Provisions) Act, 1934, 24 & 25 Geo. 5, ch. 41, § 1, reprinted in 13 HALSBURY'S STATUTES OF ENGLAND 115 (3d ed. 1969). Section 1 of the Law Reform (Miscellaneous Provisions) Act provides that all causes of action vesting in a decedent prior to death shall survive for the benefit of the decedent's estate, with the exception of causes of action for defamation, enticing away a spouse, seduction, or adultery. *Id.*

33. *Rose*, [1937] A.C. at 858-62. In *Rose v. Ford*, Lord Roche of the House of Lords stated that estimating the value of life is difficult, but not impossible. *Rose*, [1937] A.C. at 859. Lord Roche suggested that courts should estimate the value of a decedent's life by considering what life would have been worth to the decedent, without regarding the decedent's income or financial prospects. *Id.* at 860-61. Lord Wright of the House of Lords stated in *Rose* that in considering the proper amount of damages for a person's wrongfully shortened life a jury should use common sense in awarding damages considering the various aspects of life. *Id.* at 849-50. One commentator has noted that English courts' loss of expectation of life damage awards are moderate and compensate the loss of prospective happiness rather than loss of a certain length of days. SALMOND & HEUSTON, LAW OF TORTS 540-41 (18th ed. 1981). Further, the commentator notes that in determining the loss of expectation of life damages, neither the decedent's age, nor economic position is fundamentally significant. *Id.*; see 12 HALSBURY'S LAWS OF ENGLAND *Damages* ¶ 1148 (4th ed. 1975) (discussing methods of assessing loss of expectation of life damages); see also *Morgan v. Scoulding* [1938] 1 K.B. 786, 791 (allowing decedent's estate £ 1000 in damages for decedent's loss of expectation of life when decedent died instantaneously); Note, *Compensation for Negligently Shortened Life Expectancy*, 29 MD. L. REV. 24, 24-30 (1969) (tracing growth of English loss of expectation of life damage awards).

34. See, e.g., *White v. London Transport Executive*, [1982] 1 All E.R. 410, 412 (recognizing damage award of £ 1250 for decedent's loss of expectation of life); *Kandalla v. British Airways Board*, [1980] 1 All E.R. 341, 352 (awarding decedent's estate conventional sum £ 750 for loss of expectation of life); *McCann v. Sheppard*, [1973] 1 W.L.R. 540, 546-53 (reducing loss of expectation of life damage award to conventional sum of £ 750); *Benham v. Gambling*, [1941] 1 All E.R. 7, 12-13 (noting speculation involved in assessing two and one-half year old child's future happiness, court reduced loss of expectation of life award for decedent's estate from £ 1200 to £ 200); J. CLERK & W. LINDSELL, TORTS § 6-09 (15th ed. 1982) (noting that English courts assess loss of expectation of life damages at nominal conventional sum); P. ATIYAH, ACCIDENTS, COMPENSATION AND THE LAW 85, 182 (3d ed. 1980) (noting that "modest conventional sum" for loss of expectation of life damages is approximately £ 1500).

35. [1980] 2 All E.R. 557.

36. *Id.* at 567-68.

37. See *id.* (awarding £ 1250 for loss of expectation of life). The Court of Appeal in *Gammell v. Wilson* stressed that loss of expectation of life damage awards should be uniform among courts to avoid the difficulty of assessing the value of life in every case. *Id.*; see P. ATIYAH, *supra* note 35, at 213-17 (discussing difficulty in assessing arbitrary damage awards for intangible losses such as loss of expectation of life); Allen, *Is Life a Boon?*, 228 L.Q. REV. 462, 462-65 (1941) (arguing that loss of expectation of life damages are too speculative, if not impossible to measure).

all loss of expectation of life awards.³⁸ On appeal, the House of Lords affirmed the decision in *Gammell*, but encouraged Parliament to settle the confusion surrounding the amount of damages that courts awarded to a decedent's estate.³⁹

Shortly after *Gammell*, the English Parliament enacted legislation that amended the laws relating to damages for personal injury and wrongful death.⁴⁰ In the Administration of Justice Act of 1982 (Justice Act),⁴¹ Parliament specifically abolished damages for loss of expectation of life.⁴² The Justice Act, however, includes a decedent's awareness of shortened life expectancy prior to death as a factor in the damage element of pain and suffering.⁴³ Shortened life expectancy, therefore, is no longer a separate element of damages in England, although a plaintiff's knowledge of shortened life expectancy is a factor for English courts to consider when awarding a plaintiff damages for pain and suffering.⁴⁴

Courts in the United States have been hesitant to adopt separate damage awards for shortened life expectancy or loss of enjoyment of life.⁴⁵ Generally,

38. *Gammell v. Wilson* [1980] 2 All E.R. 557, 567-68.

39. See *Gammell v. Wilson* [1981] 1 All E.R. 578, 588, 590 & 595 (affirming Court of Appeal in *Gammell*, [1980] 2 All E.R. 577). Although the £ 1250 damage award for loss of expectation of life was not before the House of Lords on appeal in *Gammell*, the House of Lords expressed disfavor with any loss of expectation of life damages. *Id.* at 590.

40. See Administration of Justice Act, 1982, ch. 53, § 1 (provisions for personal injury and wrongful death), reprinted in 13 HALSBURY'S STATUTES OF ENGLAND 542-45 (4th ed. 1985); *infra* notes 41-44 and accompanying text (discussing Administration of Justice Act of 1982).

41. Administration of Justice Act, 1982, ch. 53, § 1.

42. *Id.*; see 17 HALSBURY'S STATUTES OF ENGLAND 314 (4th ed. 1986) (noting abolishment of loss of expectation of life damages); J. CLERK & W. LINDSELL, *supra* note 34, at § 6-09 (15th ed. Supp. III 1985) (discussing abolishment of loss of expectation of life damages); Borkowski & Stanton, *The Administration of Justice Act 1982 (Parts I and III): Darning Old Socks?*, 46 MOD. L. REV. 191, 192-93 (1983) (noting abolishment of conventional award for loss of expectation of life).

43. See Administration of Justice Act, 1982, ch. 53, § 1(b). The Administration of Justice Act requires a court to consider as an element of pain and suffering any suffering that the awareness of shortened life expectancy causes an injured person. *Id.*; see also 1 HALSBURY'S LAWS OF ENGLAND *Damages*, ¶ 1148 (4th ed. Supp. 1985) (noting that shortened life expectancy may be element of pain and suffering).

44. See *supra* notes 41-43 and accompanying text (discussing abolishment of loss of expectation of life as separate element of damages in English law).

45. See *Downie v. United States Lines Co.*, 359 F.2d 344, 347-48 (3d Cir.) (disapproving shortened life expectancy damages), *cert. denied*, 385 U.S. 897 (1966). In *Downie v. United States Lines Co.*, the United States Court of Appeals for the Third Circuit considered whether the plaintiff could recover damages for shortened life expectancy. *Id.* The plaintiff in *Downie* contended that the defendant's servants and agents shortened the defendant's life expectancy by aggravating a heart injury that the plaintiff had sustained aboard the defendant's ship. *Id.* at 346. The plaintiff was a 52 year old seaman with a life expectancy of another 18 years. *Id.* at 345. Reasoning that any attempt to place a value on life would be too speculative, the Third Circuit reversed the district court's \$25,000 shortened life expectancy damage award for the plaintiff. *Id.* at 348. The *Downie* court held, however, that damages were appropriate for the plaintiff's inability to pursue recreational or family activities that contribute to the

United States courts that have recognized loss of enjoyment of life damages have restricted the awards to actions that a living plaintiff brings to recover compensation for the loss of the ability to enjoy particular avocations or recreational activities.⁴⁶ At least one state, however, has recognized a separate element of damages for a decedent's loss of the enjoyment of life when a decedent's death is instantaneous.⁴⁷ In *Katsetos v. Nolan*,⁴⁸ the Connecticut Supreme Court considered a wrongful death action that arose from a doctor's medical malpractice.⁴⁹ The *Katsetos* court recognized that Connecticut law allows a decedent's estate to recover damages for a decedent's

enjoyment of life. *Id.* at 347.

The dissent in *Downie* argued that the shortening of life is a far greater injury than the loss of the ability to enjoy recreational activities. *Id.* at 350 (Kalodner, J., dissenting). Advocating the adoption of damages for shortened life expectancy, the *Downie* dissent rejected the *Downie* court's holding that the loss of the ability to engage in life's activities is compensable, while the loss of life is not. *Id.* at 350. While recognizing the difficulty in assessing the value of lost years, the dissent in *Downie* stated that the jury's collective common sense, judgment, and experience would provide reasonable awards for shortened life expectancy. *Id.* at 351; see S. SPEISER, AMERICAN LAW OF TORTS § 8:21 (1985) (noting near universal rejection of shortened life expectancy damages in American courts). *But see* Schultleis & Rheingold, *Making Up For Lost Time: Recovering for Shortened Life Expectancy*, TRIAL, Feb. 1983, at 44, 46-47 (advocating adoption of shortened life expectancy damages). Following the *Downie* decision, at least two commentators have advocated shortened life expectancy damages for a living plaintiff. See Note, *supra* note 33, at 39 (arguing for shortened life expectancy as damage award for living plaintiff); Recent Developments, *Damages—Compensation for Curtailment of Life Expectancy as a Separate Element of Damages—Downie v. United States Lines Co.*, 65 MICH. L. REV. 786, 790 (1967) (contending that living plaintiff should recover damages for shortened life expectancy); *infra* note 46 and accompanying text (discussing damages for loss of enjoyment of life).

46. See, e.g., *Dyer v. United States*, 551 F. Supp. 1266, 1280-84 (W.D. Mich. 1982) (awarding injured plaintiff loss of enjoyment of life damages applying Michigan Law); *Swiler v. Baker's Super Market, Inc.*, 203 Neb. 183, ___, 277 N.W.2d 697, 700 (1979) (upholding trial court jury instruction regarding loss of enjoyment of life damages for injured plaintiff); *Mariner v. Marsden*, 610 P.2d 6, 10-17 (Wyo. 1980) (holding that loss of enjoyment of life is compensable injury for injured plaintiff); see also S. Speiser, *supra* note 45, at § 8:20 (discussing personal injury damages for loss of enjoyment of life); Annotation, *Loss of Enjoyment of Life as a Distinct Element or Factor in Awarding Damages For Bodily Injury*, 34 A.L.R. 4TH 293, 300-11 (1984) (discussing loss of enjoyment of life as separate element of damages for injured plaintiff); Comment, *Loss of Enjoyment of Life—Should it Be A Compensable Element of Personal Injury Damages?*, 11 Wake Forest L. Rev. 459, 471-72 (1975) (advocating diminished enjoyment of life as separate element of damages for injured plaintiff); Comment, *Loss of Enjoyment of Life as an Element of Damages*, 73 DICK L. REV. 639, 646 (1969) (advocating adoption of loss of enjoyment of life damages as separate element of personal injury damages).

47. See *Kiniry v. Danbury Hospital*, 183 Conn. 448, ___, 439 A.2d 408, 414-15 (1981) (holding that Connecticut law allows jury to consider decedent's loss of life and loss of ability to enjoy life's activities in awarding damages); *Waldron v. Raccio*, 166 Conn. 608, ___, 353 A.2d 770, 774-75 (1974) (holding that decedent's estate is entitled to compensation for decedent's loss of ability to enjoy life's activities based on jury's evaluation of decedent's life and activities).

48. 170 Conn. 637, ___, 368 A.2d 172 (1976).

49. *Id.* at 175-77.

loss of the ability to live and enjoy life's activities.⁵⁰ In awarding such damages, the court noted that the 41 year old decedent had a 73 year life expectancy and discussed the many positive aspects of the decedent's life.⁵¹ Dismissing the defendant's claim that a \$400,000 general damage award was excessive, the Connecticut Supreme Court in *Katsetos* held that the facts concerning the decedent's life and activities supported the award.⁵² Thus, damages for a decedent's loss of life and loss of the ability to enjoy life are not unknown to state courts in the United States.⁵³

In addition to the Connecticut Supreme Court, some federal courts have fashioned damage remedies for a decedent's loss of life and loss of the pleasure of living in section 1983 actions arising from the unconstitutional deprivation of a decedent's life.⁵⁴ These courts have justified such remedies as facilitating either the compensatory or deterrent policies of section 1983, or both.⁵⁵ For example, in *Bell v. City of Milwaukee*,⁵⁶ the United States Court of Appeals for the Seventh Circuit considered the propriety of a lower court jury verdict of \$100,000 for a decedent's loss of life and loss of the enjoyment of living.⁵⁷ The section 1983 action in *Bell* arose from the unjustified police shooting and killing of Daniel Bell.⁵⁸ Noting the policies of compensation and deterrence underlying section 1983, the Seventh Circuit held that Wisconsin law prohibiting damages for the loss of a decedent's life interfered with the section 1983 policies of compensation and deterrence.⁵⁹ In upholding the \$100,000 award for the decedent's loss of life and

50. *Id.* at 183-84.

51. *Id.* at 184. The decedent in *Katsetos* was married and had four children. *Id.* The decedent was a licensed hairdresser and also worked in the family pizza business. *Id.* The decedent was in good health until the time of her death. *Id.*

52. *Id.* The *Katsetos* court noted that the \$400,000 general damage award for the decedent's estate included lost future earnings, pain and suffering and loss of the ability to enjoy life's activities. *Id.*

53. See *supra* notes 47-52 and accompanying text (discussing damages in Connecticut for loss of life and loss of ability to enjoy life's activities damages in Connecticut).

54. See, e.g., *Bell v. City of Milwaukee*, 746 F.2d 1205, 1234-41 (7th Cir. 1984) (adopting loss of life and loss of enjoyment of life damages); *Sherrod v. Berry*, 629 F. Supp. 159, 159-64 (N.D. Ill. 1985) (adopting hedonic damages for loss of life), *appeal docketed*, No. 85-3151 (7th Cir. Dec. 12, 1985); *Roman v. City of Richmond*, 570 F. Supp. 1554, 1555-58 (N.D. Cal. 1983) (fashioning "deterrent damages" for loss of life); *Guyton v. Phillips*, 532 F. Supp. 1154, 1167-68 (N.D. Cal. 1981) (adopting loss of life damages).

55. See *supra* notes 16-23 and accompanying text (discussing compensatory and deterrent policies of § 1983).

56. 746 F.2d 1205 (7th Cir. 1984).

57. *Id.* at 1234.

58. *Id.* at 1214. The events giving rise to the § 1983 claim in *Bell v. City of Milwaukee* occurred in 1958. *Id.* Police, however, concealed the facts surrounding the police killing of Daniel Bell. *Id.* Bell's family and estate, therefore, did not file the § 1983 action and accompanying civil rights claims until 1979, when the family discovered the coverup and the true facts surrounding Bell's death. *Id.* at 1224.

59. *Id.* at 1236-41; see WIS. STAT. ANN. §§ 895.01, 895.04 (West's 1983) (Wisconsin wrongful death laws prohibiting damages for decedent's loss of life). In civil rights actions, § 1988 of title 42 of the United States Code requires federal courts to apply state law remedies,

loss of the enjoyment of living, the *Bell* court stressed the deterrent effect that damage awards for loss of life have on curbing official lawlessness.⁶⁰ Additionally, the Seventh Circuit in *Bell* differentiated between the deterrent effect of loss of life damages and the punishing effect of punitive damages in upholding a punitive damage award for the decedent's estate in addition to the deterrent loss of life damage award.⁶¹ Thus, the Seventh Circuit in *Bell* recognized the Supreme Court's mandate in *Carey* that courts should fashion section 1983 remedies to fit particular injuries and established a remedy for the unconstitutional deprivation of life.⁶²

Prior to the *Bell* court's fashioning of loss of life damages, the United States District Court for the Northern District of California in *Guyton v. Phillips*⁶³ considered whether a decedent's loss of life was a compensable injury that survived for the decedent's estate in a section 1983 action.⁶⁴ The action in *Guyton* arose when police unjustifiably used deadly force against the decedent.⁶⁵ The *Guyton* court reasoned that the unjustified killing of the decedent was an injury that required a remedy.⁶⁶ The district court maintained that federal courts have the authority to fashion remedies in section 1983 actions to advance the section 1983 policies of compensation and deterrence.⁶⁷ Although the district court in *Guyton* recognized the difficulty in assessing the value of life, the court held that loss of life damages were not speculative.⁶⁸ Deeming the use of economic factors such

unless the state law interferes with the purposes of federal law. 42 U.S.C. § 1988 (1982); *see supra* notes 9-13 and accompanying text (discussing § 1988). In holding that Wisconsin law interfered with the compensatory and deterrent policies of § 1983, the Seventh Circuit in *Bell* relied on the United States Supreme Court decision in *Carey v. Phipps* which approved judicial formulation of remedies when state law remedies are inappropriate. *Bell v. City of Milwaukee*, 746 F.2d 1205, 1239 (7th Cir. 1984); *see Carey v. Phipps*, 435 U.S. 247, 258 (1978) (federal courts should formulate remedies in § 1983 actions when existing remedies are inappropriate); *supra* text accompanying notes 16-23 (discussing *Carey* mandate for federal courts to formulate appropriate remedies in § 1983 actions).

60. *Bell*, 746 F.2d at 1238-41. The *Bell* court noted that the fundamental purpose of § 1983 is to protect life. *Id.* at 1239. The *Bell* court reasoned that by ensuring that government officials realize the potential cost of unjustified killing damages for loss of life deter unconstitutional acts. *Id.*; *see also infra* notes 137-42 and accompanying text (discussing difference between deterrent effect of compensatory damages and punishing effect of punitive damages).

61. *Bell*, 746 F.2d at 1279-80. The *Bell* court upheld \$25,000 in punitive damages against the police officer who killed Daniel Bell. *Id.*

62. *Id.* at 1234-41; *see supra* notes 56-61 and accompanying text (discussing Seventh Circuit's fashioning of loss of life and loss of enjoyment of living damages in *Bell*); *see also* Bass v. Wallenstein, 769 F.2d 1173, 1189-90 (7th Cir. 1985) (reaffirming holding in *Bell* that decedent's estate may recover loss of life damages in § 1983 actions).

63. 532 F. Supp. 1154 (N.D. Cal. 1981).

64. *Id.* at 1164-65.

65. *Id.* at 1156-59. In *Guyton v. Phillips*, police officers shot and killed the decedent, a fourteen year old black male, allegedly after hearing gunshots and seeing the decedent point a gun. *Id.* No evidence supported the police officers' allegations that the decedent pointed or fired a gun. *Id.* at 1158.

66. *Id.* at 1167-68.

67. *Id.* at 1164-67.

68. *Id.* at 1168.

as future earnings discriminatory and unrepresentative of the value of life, the *Guyton* court determined that the most appropriate method for assessing a monetary value of life would be a comparison of awards in other unconstitutional deprivation cases.⁶⁹ Before holding that \$100,000 was a reasonable award for the decedent's loss of life, the *Guyton* court considered awards in cases arising from unconstitutional activity such as an unlawful arrest, a violation of the right to vote, and a deprivation of the right to practice religion.⁷⁰ The district court in *Guyton*, therefore, recognized that the unjustified deprivation of life is the most serious constitutional violation and deserves a substantial remedy.⁷¹

While the *Guyton* court noted the compensatory and deterrent effects of damages for a decedent's loss of life, the District Court for the Northern District of California in *Roman v. Richmond*⁷² specifically labeled loss of life damages in a section 1983 action "deterrent damages."⁷³ The *Roman* court considered a section 1983 claim arising when police unjustifiably used deadly force against the decedent.⁷⁴ The *Roman* court noted that although injured plaintiffs in section 1983 actions often recover substantial damages for medical treatment, a decedent in a section 1983 action, whose death is the result of unconstitutional activity, receives only limited damages.⁷⁵ The district court in *Roman* maintained that the paradox of substantial damages for an injured plaintiff and limited damages for a decedent renders killing less expensive than injuring.⁷⁶ The court reasoned that a loss of life damage remedy responsive to the unconstitutional deprivation of a decedent's life would deter future unjustified killings.⁷⁷ Stressing the deterrent policy of section 1983, the *Roman* court upheld a \$1,500,000 general damage award that included substantial loss of life deterrent damages.⁷⁸

69. *Id.* The *Guyton* court stated that the original purpose of § 1983 was to protect the rights of blacks. *Id.* The court reasoned that because the economic status of blacks generally is lower than that of whites, the use of economic factors to value life would racially discriminate against blacks. *Id.* The *Guyton* court concluded, therefore, that using economic factors to value life would defeat the historical purposes of § 1983. *Id.*; see *supra* note 2 and accompanying text (discussing purposes of § 1983).

70. *Guyton*, 532 F. Supp. at 1168. The damage awards that the *Guyton* court considered ranged from \$750 to \$10,000. *Id.*; see, e.g., *Wayne v. Venable*, 260 F. 64, 65-70 (8th Cir. 1919) (awarding \$2000 for violation of plaintiff's right to vote); *Bryant v. McGinnis*, 463 F. Supp. 373, 388 (W.D.N.Y. 1978) (awarding \$3000 for violation of prisoner's right to practice religion); *Krueger v. Miller*, 489 F. Supp. 321, 383 (E.D. Tenn. 1977), *aff'd* 617 F.2d 603 (6th Cir. 1980) (awarding \$5250 for unlawful arrest).

71. *Guyton v. Phillips*, 532 F. Supp. 1154, 1167 (N.D. Cal. 1981).

72. 570 F. Supp. 1554 (N.D. Cal. 1983).

73. *Id.* at 1556-58.

74. *Id.* at 1155-56.

75. *Id.* at 1557.

76. *Id.*

77. *Id.*

78. *Id.* at 1556 & n.1. Noting that the jury awarded a \$1,500,000 general damage award, the *Roman* court maintained that the court could not determine what portion of the \$1,500,000 award constituted deterrent damages. *Id.*; see *supra* text accompanying notes 72-77 (discussing deterrent damages in *Roman*).

Rather than labeling section 1983 loss of life damages "deterrent damages," the District Court for the Northern District of Illinois in *Sherrod v. Berry*⁷⁹ awarded a decedent's estate hedonic damages for the value of the decedent's lost life and lost pleasure of living.⁸⁰ The section 1983 claim in *Sherrod* arose when a Joliet, Illinois police officer unjustifiably shot and killed Ronald Sherrod.⁸¹ Sherrod died instantly.⁸² Sherrod, a nineteen year old black male, had no prior criminal record.⁸³ News reports and Sherrod's death certificate, however, wrongly implicated Sherrod as a criminal suspect.⁸⁴ Sherrod's family requested that the Joliet police chief clear Sherrod's name of criminal implications and discipline the police officer who killed Sherrod.⁸⁵ After the Joliet police chief refused to clear Sherrod's name or discipline the officer, Sherrod's father instituted a section 1983 action against the police officer who killed Sherrod, the police chief, and the City of Joliet.⁸⁶ Recognizing that compensation is the basic purpose of section 1983 damages, the district court in *Sherrod* instructed the jury to compensate the estate of Ronald Sherrod for the value of Sherrod's life if the jury found the defendants liable for violating Sherrod's fourteenth amendment right to life.⁸⁷ The jury in *Sherrod* found each defendant liable and awarded Sherrod's estate \$850,000 for the "hedonic" value of Sherrod's life.⁸⁸

The district court in *Sherrod* defined damages for the hedonic value of a person's life as compensation for a person's loss of life and loss of the pleasures of living.⁸⁹ The court found that the phrase, "hedonic value of life" encompasses the totality of a person's existence, which, according to the court, includes the economic, moral, and philosophical value that society

79. 629 F. Supp. 159 (N.D. Ill. 1985), *appeal docketed*, No. 85-3151 (7th Cir. Dec. 12, 1985).

80. *Id.* at 162-64; *see supra* text accompanying notes 24-28 (discussing *Sherrod* as first American court to label loss of life and loss of pleasures of living damages as damages for "hedonic value" of decedent's life).

81. *Sherrod*, 629 F. Supp. at 160-62.

82. *Id.* at 162.

83. *Id.* at 160.

84. *Id.* at 162. At the time of his death, Sherrod was in the company of a robbery suspect. *Id.* at 161. Sherrod, however, did not know that his passenger was a robbery suspect. *Id.*

85. *Id.* at 162. The *Sherrod* court recounted that the police chief repeatedly refused to clear Ronald Sherrod's name of criminal implications. *Id.* The court noted further that on at least three occasions prior to the Sherrod killing, Joliet citizens complained that the police officer who shot Sherrod used excessive force during confrontations with citizens. *Id.* The *Sherrod* court noted that neither the police chief nor the City of Joliet disciplined the police officer either on those three occasions or after the police officer killed Sherrod. *Id.*

86. *Id.* at 160, 162.

87. *Id.* at 160; *see supra* notes 6-7 (discussing deprivation of fourteenth amendment right to life as actionable under § 1983).

88. *Sherrod*, 629 F. Supp. at 160; *see* Blodgett, *supra* note 27, at 25 (hedonic damages redress deprivation of decedent's pleasure of living).

89. *See Sherrod*, 629 F. Supp. at 162-63 (quoting economist's testimony in *Sherrod* defining term "hedonic value of life").

places on life.⁹⁰ In addition, the *Sherrod* court maintained that a person's enjoyment of activities in life and expectations of life's future prospects are elements of the hedonic value of a person's life.⁹¹ The *Sherrod* court continued that although a person's economic status may relate to that individual's pleasure of living, hedonic damages do not measure a person's economic worth or future earnings capacity.⁹² The *Sherrod* court, therefore, found that hedonic damages require a subjective analysis of an individual's life and the pleasure that the particular individual derived from living.⁹³

The testimony of Sherrod's family members enabled the jury in *Sherrod* to analyze the hedonic value of Sherrod's life.⁹⁴ Additionally, an economist aided the *Sherrod* jury in translating the hedonic value of Sherrod's life into a monetary value for the hedonic damage award.⁹⁵ In his testimony, the economist summarized a number of economic studies that attempt to value life in monetary terms.⁹⁶ The economic studies in *Sherrod* concerned expenditures that government, private industry, and individuals are willing

90. See *id.* (defining hedonic value of life).

91. *Id.*

92. See *id.* (discussing hedonic damages in *Sherrod*). The economist in *Sherrod*, Stanley V. Smith, President, Corporate Financial Group, Ltd., Chicago, Illinois, stated that although a person's economic worth is not the basis of hedonic damages, economists have found that the hedonic value of a person's life ranges from 3 to 30 times a person's economic productive income. *Id.* at 163 (discussing economist's testimony in *Sherrod*).

93. See *id.* at 164. The \$850,000 hedonic damage award in *Sherrod* valued Sherrod's life, not the value of human life generally or the value of Sherrod's constitutional right to life. See *id.* at 162-64. This difference between the value of Sherrod's life and the value of Sherrod's right to life is important because the United States Supreme Court has held that federal courts cannot award § 1983 damages for the abstract value of a constitutional right. See *Memphis Community School District v. Stachura*, 54 U.S.L.W. 4771, 4774 (U.S. June 25, 1986) (holding that § 1983 damages for abstract value of constitutional right are invalid); see also *infra* note 94 and accompanying text (noting evidence that enabled *Sherrod* jury subjectively to analyze hedonic value of Sherrod's life).

94. See *Sherrod*, 629 F. Supp. at 160. The *Sherrod* court summarized the facts of Sherrod's life enabling the *Sherrod* jury to evaluate the hedonic value of Sherrod's life. *Id.* Sherrod had a high school education and was gainfully employed as a mechanic in his father's auto repair shop which he was soon to take over as proprietor. *Id.* at 160-61. Further, Sherrod had no past criminal record and the Sherrod family stated that Sherrod enjoyed life. *Id.* at 160.

95. See *id.* at 162-64 (discussing importance of economist's testimony in *Sherrod* concerning hedonic value of life); *infra* text accompanying notes 96-99 (discussing economist's testimony in *Sherrod*).

96. See *Sherrod*, 629 F. Supp. at 163-64. The *Sherrod* court noted several of these economic studies that attempt to value life. See, e.g., S. SPEISER, RECOVERY FOR WRONGFUL DEATH, ECONOMIC HANDBOOK § 12:5 (2d ed. 1979) (discussing possible relationship between a person's earnings and value of person's life); Blomquist, *The Value of Human Life: An Empirical Perspective*, 19 ECON. INQUIRY 157, 158-63 (1981) (comparing value of life with future earnings); Dardis, *The Value of a Life: New Evidence from the Marketplace*, 70 AM. ECON. REV. 1077, 1078-82 (1980) (discussing relationship between value of life and consumers' willingness to pay for personal injury risk reduction devices such as smoke detectors); Linnerooth, *The Value of Human Life: A Review of Models*, 17 ECON. INQUIRY 52, 55 (1979) (noting that economic analyses of value of life are actually value of risk reduction analyses).

to make to save or protect life.⁹⁷ Basing his evaluation on these economic studies, the economist in *Sherrod* concluded that the hedonic value of Sherrod's life ranged from \$1,200,000 to \$12,000,000.⁹⁸ Although the defendants in *Sherrod* argued that both the \$850,000 hedonic damage award and the economist's testimony were speculative, the district court held that any competent evidence which enabled the jury to determine damages was admissible.⁹⁹

97. See *Sherrod*, 629 F. Supp. at 164 (citing economic studies that attempt to value human life); *supra* note 96 and accompanying text (noting examples of economic studies concerning the value of life). The record of the economist's testimony in *Sherrod* reflects the economist's summary of economic studies concerning government expenditures to protect or save a statistical life. These studies include United States military expenditures of \$1,000,000 to save a life in a military aircraft, United States government expenditures of \$1,200,000 to save a life in a civilian aircraft, expenditures of \$3,000,000 to install life saving air bags in automobiles, and Department of Energy expenditures of up to \$200,000,000 to save a life during interstate transport of nuclear waste. Record at 55-61, *Sherrod*, 629 F. Supp. 159 (N.D. Ill. 1985). Recently, the Occupational Safety and Health Administration (OSHA) commissioned a study to determine the value of a life. See Earley, *What's A Life Worth?*, WASH. POST MAGAZINE 11 (June 9, 1985). The OSHA study considered workers' who take potentially fatal risks at the workplace. *Id.* at 13, 36-37. The OSHA study first gathered data of high risk occupations, using accident and death rate figures. *Id.* The study then compared these high risk occupations with the compensation of workers in these occupations. *Id.* Although the study showed that some workers in high risk occupations had a value of life of around \$650,000, OSHA established \$3,500,000 as the value of a statistical life. *Id.*

History and religion also provide interesting examples of the value of life. Oliver Holmes, Jr. once predicted that courts might imitate the *Legis Barbarorum's* tariff for life and limb in estimating the value of a life to the community. O. W. HOLMES, JR., *The Path of the Law*, in *THE COMMON LAW AND OTHER WRITINGS* 183-84 (1897). For example, under the sixth century laws of English King Æthelberht, a slain man's life had a value with regard to the man's class or rank in the feudal system. See *THE LAWS OF THE EARLIEST ENGLISH KINGS* 5-7 (F.L. Attenborough ed. & trans. 1974). Æthelberht's laws required anyone who killed another to pay money damages in the amount that the law recognized as the value of the decedent's life. See *id.* at 97-99 (discussing laws of Æthelberht). Additionally, a ninth century treaty between the English and the Danes included an agreement that recognized eight half-marks of pure gold as the value of a slain man's life. See *id.* (discussing treaty between English King Alfred and Danish King Guthrum). The same treaty valued slain commoners or freedmen at two hundred shillings. See *id.* (discussing treaty between King Alfred and King Guthrum).

In addition to early English law, religion also provides insight into the value of life. See *Matthew* 10:29-10:31 (Ryrie Study Bible New American Standard). In the New Testament, Jesus Christ compared the value of man's life to the price of two sparrows, and concluded that a man's life is worth much more than many sparrows. See *id.* (discussing Matthew's recording of Jesus Christ's words). During the lifetime of Jesus Christ, two sparrows were worth a penny, or one day's wages for a laborer. See *id.* at translator's note 10:29 (explaining Jesus Christ's comparison of value of life and value of sparrows).

98. See Record at 55-61, *Sherrod* (recording economist's estimate of value of Sherrod's life).

99. *Sherrod*, 629 F. Supp. at 162, 164. Citing several cases as authority, the district court in *Sherrod* concluded that the rule against speculative damages applies to speculation surrounding the cause of the damages, rather than the speculation involved in measuring the damage. *Id.* See *Shannon v. Shaffer Oil & Refining Co.*, 51 F.2d 878, 881 (10th Cir. 1931) (difficulty in assessing damages not grounds for denying damages); *Calkins v. F.W. Woolworth Co.*, 27 F.2d 314, 319 (8th Cir. 1928) (damage recovery appropriate although existence, nature,

Hedonic damages are an appropriate remedy in section 1983 actions arising from the unconstitutional deprivation of a person's life. Although section 1983 provides a federal cause of action for violations of a person's constitutional rights, and federal courts have the authority to fashion section 1983 remedies, few federal courts have recognized that a person's loss of life and loss of the pleasure of living is a compensable injury under section 1983.¹⁰⁰ While federal courts have provided for various injuries alleged by a decedent's estate or a decedent's beneficiaries in a section 1983 action arising from an unconstitutional deprivation of a decedent's life, these available remedies generally have failed to compensate a decedent's loss of life and loss of the pleasure of living.¹⁰¹ To fill this vacuum in current section 1983 remedies, federal courts should expand available section 1983 remedies to include damages for the hedonic value of a decedent's life.

Federal courts have derived the existing section 1983 remedies for the unconstitutional deprivation of a person's life from state wrongful death and survival action remedies in accordance with section 1988.¹⁰² These remedies include a decedent's lost future earnings,¹⁰³ pain and suffering prior to death,¹⁰⁴ medical expenses incurred prior to death and funeral

or cause of damages may be uncertain); *Crichfield v. Julia*, 147 F. 65, 70-71 (2d Cir. 1906) (rule against speculative damages concerns uncertainty of cause, not measurement of damages).

100. See *supra* notes 1-7 (discussing § 1983 federal cause of action for violations of constitutional rights); see *supra* notes 16-23 and accompanying text (discussing federal court's authority to fashion § 1983 remedies); *supra* notes 45-46 (discussing American courts' general rejection of loss of life damages); *supra* notes 48-99 and accompanying text (discussing state and federal courts that have adopted loss of life damages).

101. See *infra* text accompanying notes 102-107 (discussing available § 1983 remedies).

102. See *supra* text accompanying notes 9-12 (discussing § 1988); *supra* text accompanying notes 16-23 (discussing federal courts' authority to fashion § 1983 remedies when state law is inconsistent with purposes of § 1983).

103. See, e.g., *Runyon v. District of Columbia*, 463 F.2d 1319, 1321-23 (D.C. Cir. 1972) (estate of decedent may recover for decedent's lost future earnings); *Weaver v. Ford Motor Co.*, 382 F. Supp. 1068, 1076-77 (E.D. Pa.) (minor decedent's estate entitled to recover minor decedent's lost future earnings) *aff'd without opinion.*, 515 F.2d 506, 507 (3d Cir. 1974); *Balmer v. Dille*, 81 Wash. 2d 367, 370-71, 502 P.2d 456, 458-59 (1972) (decedent's estate entitled to recover decedent's lost future earnings); see also 2 SPEISER, *supra* note 12 at § 14:7 (discussing recovery for decedent's lost future earnings under state survival and wrongful death statutes); Annotation, *Recovery of Value of Earnings Decedent Would Have Made After Death*, 76 A.L.R.3d 125, 127-37 (1977) (providing examples of recoveries for decedent's lost future earnings under state survival and wrongful death law).

104. See, e.g., *Poynor v. Cure*, 443 So. 2d 1151, 1160-61 (La. Ct. App.) (decedent's estate can recover for decedent's conscious pain and suffering, but not recover for pain and suffering allowed when decedent's death is instantaneous), *cert. denied*, 446 So. 2d 1225, 1226 (La. 1983); *Sheets v. Graco, Inc.* 292 N.W.2d 63, 66-68 (N.D. 1980) (noting that decedent's estate usually can recover for decedent's conscious pain and suffering prior to death); *Heffner v. Allstate Ins. Co.*, 265 Pa. Super. 181, 190, 401 A.2d 1160, 1164 (1979) (decedent's estate can recover for decedent's conscious pain and suffering prior to death), *aff'd* 421 A.2d 629 (Pa. 1980); see also 2 SPEISER, *supra* note 12 at 14:8-12 (discussing recovery for pain and suffering).

expenses,¹⁰⁵ and a decedent's survivors' loss of the decedent's companionship, love or affection.¹⁰⁶ With few exceptions, neither state nor federal courts have awarded damages for loss of expectation of life, shortened life expectancy, or loss of enjoyment of life when a decedent's death is instantaneous.¹⁰⁷ As the *Sherrod* court maintained, the value of a person's life is larger than a person's economic worth or future earnings.¹⁰⁸ The *Sherrod* court awarded hedonic damages to compensate the decedent's estate for the decedent's loss of the larger value of life, which is the loss of the pleasure of living, that current section 1983 remedies fail to redress.¹⁰⁹ Hedonic damages as defined in *Sherrod*, therefore, fill the vacuum in existing section 1983 remedies and ensure that a decedent's estate recovers compensation for not only the decedent's lost economic potential and pain and suffering, but also for the decedent's much greater injury of loss of life and loss of the pleasure of living.¹¹⁰

The chief criticism of damages for a decedent's loss of life and loss of the pleasure of living, is that a dead person is unable to enjoy the benefit of such damages and, therefore, the decedent's estate receives an unwarranted windfall.¹¹¹ Under the legal fiction of a decedent's estate, however, the estate stands in the place of and collects debts for the decedent.¹¹² A wrongdoer who unconstitutionally deprives a person of life owes the dece-

105. See, e.g., ME. REV. STAT. ANN. tit. 18-A, § 2-804(b) (1964) (providing for funeral and medical expenses damage award for decedent's estate); MO. REV. STAT. § 537.090 (Vernon's Supp. 1986) (providing for funeral and medical expenses damage award); OKLA. STAT. ANN. tit. 12, § 1053(B) (1987 Supp.) (providing for damage award for medical and burial expenses); see also 2 SPEISER, *supra* note 12 at § 14:6 (discussing funeral and medical expenses damage awards).

106. See, e.g., *In re Air Crash Disaster at New Orleans*, 795 F.2d 1230, 1237 (5th Cir. 1986) (decedent's survivors entitled to damages for loss of decedent's love and affection); *Platt v. McDonnell Douglas Corp.*, 554 F. Supp. 360, 361 (E.D. Mich. 1983) (decedent's siblings may recover damages for loss of decedent's society and companionship); *Bullard v. Barnes*, 102 Ill. 2d 505, 512-18, 468 N.E.2d 1228, 1233-34 (1984) (parents may recover for loss of decedent's society); see also 1 SPEISER, RECOVERY FOR WRONGFUL DEATH 2D § 3:49 (1975) (discussing damage awards for loss of society, affection, companionship and consortium).

107. See *supra* notes 45-46 and accompanying text (discussing American courts' treatment of loss of enjoyment of life damages).

108. *Sherrod*, 629 F. Supp. at 162-64; see *supra* text accompanying notes 89-99 (discussing hedonic value of life).

109. *Sherrod*, 629 F. Supp. at 162-64; see *supra* text accompanying notes 81-91 and accompanying text (discussing basis for hedonic damage award in *Sherrod*).

110. See *supra* notes 100-09 and accompanying text (discussing need to supplement available § 1983 remedies with hedonic damages).

111. See *Flannery v. United States*, 718 F.2d 108, 111 (4th Cir. 1983) (comatose plaintiff unable to enjoy benefit of damages which compensate loss of ability to enjoy life), *cert. denied*, 467 U.S. 1226 (1984); *infra* note 136 and accompanying text (discussing *Flannery* court's objection to loss of ability to enjoy life damages); see also *supra* notes 45-46 and accompanying text (discussing American courts' treatment of loss of enjoyment of life damages and inability of decedent to enjoy benefit of loss of life damages).

112. See *supra* notes 9-14 and accompanying text (discussing survival of § 1983 actions and legal fiction of decedent's estate).

dent redress.¹¹³ A wrongdoer cannot return life to a decedent, and Anglo-American law historically has recognized that a wrongdoer should pay money damages for injuries that the wrongdoer has caused.¹¹⁴ A hedonic damage award, therefore, ensures that a wrongdoer pays a decedent's estate, which represents the decedent, the money damages that the wrongdoer owes the decedent for depriving the decedent of life and the pleasure of living.¹¹⁵

In addition to the general propriety of an estate's recovery of damages for a decedent, federal courts specifically have allowed some injuries that a decedent suffers to survive the decedent's death as a compensable injury for the benefit of the decedent's estate.¹¹⁶ Under section 1988 of title 42 of the United States Code, federal courts apply the available damage remedies and survival of action laws of the state in which the cause of action arose in section 1983 actions.¹¹⁷ The majority of states allow a decedent's estate to recover damages for a decedent's pain and suffering prior to death.¹¹⁸ In a section 1983 action, therefore, a decedent's estate recovers damages for a decedent's pain and suffering prior to death if a decedent's cause of action arose in a state that allows a decedent's pain and suffering claim to survive the decedent's death.¹¹⁹ In addition to pain and suffering, several states allow a decedent's estate to recover damages for a decedent's loss of future earnings when a wrongdoer kills the decedent.¹²⁰ Federal courts, therefore, will award a decedent's estate the decedent's lost future earnings in a section 1983 action arising in a state that considers a decedent's loss of future earnings a compensable injury.¹²¹ Further, the Supreme Court decision in *Carey v. Piphus* authorizes federal courts to fashion remedies

113. See *Guyton*, 532 F. Supp. at 1167 (discussing necessity for remedy for deprivation of a person's life).

114. See C. MCCORMICK, DAMAGES 21-24 (1935) (discussing origins of money damages in English law); 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 523-34 (1968 ed.) (discussing growth of money damages in civil actions in English law).

115. See *supra* text accompanying notes 79-101 (discussing compensation that hedonic damages afford decedent through decedent's estate).

116. See *infra* notes 118-19 and accompanying text (discussing survival of pain and suffering and loss of earnings damage claims in § 1983 actions).

117. See 42 U.S.C. § 1988 (1982) (federal courts apply state law remedies in § 1983 actions); *supra* text accompanying notes 9-12 (discussing provisions of § 1988).

118. See *supra* note 104 and accompanying text (discussing pain and suffering prior to death as recoverable claim in majority of state jurisdictions).

119. See *Grandstaff v. City of Borger*, 767 F.2d 161, 166-72 (5th Cir. 1985) (upholding \$100,000 jury verdict for decedent's pain and suffering prior to death in § 1983 action). In *Guyton v. Phillips*, the court allowed the jury to award \$15,000 to the decedent's estate for the decedent's pain and suffering prior to death, despite state law that prohibited pain and suffering damages for a decedent's estate. See *Guyton*, 532 F. Supp. 1154 at 1166-67 (N.D.Cal. 1981); *supra* text accompanying notes 63-71 (discussing *Guyton*).

120. See *supra* note 103 and accompanying text (discussing survival of decedent's lost future earnings for benefit of decedent's estate).

121. See *Sherrod*, 629 F. Supp. at 160, 164 (awarding \$300,000 for economic loss to decedent's estate); *supra* note 103 and accompanying text (discussing decedent's lost future earnings as damages for decedent's estate).

in section 1983 actions when state law remedies are inadequate.¹²² Thus, substantial precedent exists for federal courts to allow damages for the hedonic value of a decedent's life to survive for the decedent's estate.¹²³

The United States Supreme Court repeatedly has held that compensation is the basic purpose of section 1983 remedies.¹²⁴ By awarding hedonic damages, federal courts will compensate a decedent's actual injury of loss of life and loss of the pleasure of living.¹²⁵ Federal courts rejecting hedonic damages ignore the protection that the United States Constitution affords a person's right to life.¹²⁶ Moreover, the survival of section 1983 claims and the legal fiction of a decedent's estate allows the wrongdoer to compensate a decedent for the decedent's loss of life and loss of the pleasure of living.¹²⁷ Hedonic damages, therefore, ensure that the federal courts fulfill the section 1983 policy of compensation for actual injury.

In addition to providing compensation for a decedent's loss of life and loss of the pleasure of living, hedonic damages may also deter unlawful conduct resulting in a person's death.¹²⁸ The United States Supreme Court in *Carey* recognized that deterrence is inherent in substantial compensatory damages.¹²⁹ Arguably, a wrongdoer is not cognizant of damage awards in a section 1983 action when the wrongdoer unconstitutionally deprives a person of life.¹³⁰ Substantial hedonic damage awards, however, place governmental law enforcement agencies on notice that a decedent's estate will recover for unlawful conduct that causes a decedent's death.¹³¹ For example,

122. See *supra* notes 16-23 and accompanying text (discussing *Carey*).

123. See *supra* text accompanying notes 116-22 (discussing survival of decedent's claims for decedent's estate in § 1983 actions).

124. See *Memphis Community School Dist. v. Stachura*, 54 U.S.L.W. 4771, 4773 (U.S. June 25, 1986) (reaffirming that compensation is basic purpose of § 1983 damages); *Carey v. Piphus*, 435 U.S. 247, 254-55 (1978) (maintaining that compensation is basic purpose of § 1983 remedies); see also *supra* text accompanying notes 16-23 (discussing *Carey* view that compensation is basic purpose of § 1983 damages).

125. See *supra* text accompanying notes 89-93 (discussing purpose of hedonic damages).

126. See U.S. CONST. amend. XIV, § 1 (right to life, liberty and property); *supra* notes 6-7 and accompanying text (discussing fourteenth amendment protection of life).

127. See *supra* text accompanying notes 8-13 (discussing survival of § 1983 actions and legal fiction of decedent's estate).

128. See *Bell v. City of Milwaukee*, 746 F.2d 1205, 1239 (7th Cir. 1984) (discussing deterrence policy of § 1983 in awarding loss of life and loss of enjoyment of life damages); *Roman v. City of Richmond*, 570 F. Supp. 1554, 1556-58 (N.D. Cal. 1983) (stressing importance of deterrence in awarding § 1983 loss of life deterrent damages); *Guyton v. Phillips*, 532 F. Supp. 1154, 1167 (N.D. Cal. 1981) (discussing need for § 1983 loss of life damages to deter future unlawful conduct).

129. See *Carey v. Piphus*, 435 U.S. 247, 256-57 (1978) (formidable deterrent inherent in substantial compensatory damages); see also *supra* text accompanying notes 16-23 (discussing holding in *Carey*).

130. Cf. Newman, *Suing the Lawbreakers*, 87 YALE L.J. 447, 464-67 (1978) (discussing need to strengthen deterrence effect of § 1983 damages); Project, *Suing the Police in Federal Court*, 88 YALE L.J. 781, 810-18 (1979) (discussing deterrence effect of § 1983 damage awards).

131. Cf. Newman, *supra* note 130, at 464-67 (stressing need for § 1983 reform to strengthen compensation and deterrence policies of § 1983); Project, *supra* note 130, at 814-18 (discussing need for substantial damages to deter unlawful conduct).

in *Sherrod*, the police officer who unjustifiably killed Sherrod had a history of unwarranted abusive and violent conduct against citizens.¹³² Neither Joliet police officials nor the City of Joliet had disciplined the police officer for this conduct.¹³³ Further, Joliet police officials refused to discipline the police officer after the officer killed Sherrod without any justification.¹³⁴ Because the City of Joliet and the police officer were liable for the hedonic damage award of \$850,000, the hedonic damage award in *Sherrod* potentially will deter future Joliet police misconduct and might ensure that city authorities discipline police for unlawful conduct.¹³⁵ Despite the potential compensation and deterrent effects of hedonic damages, at least one court and several commentators have argued that damages for a decedent's shortened life expectancy or loss of life and loss of the pleasure of living are punitive.¹³⁶ Although the difference between compensatory damages that have a deterrent effect and punitive damages that punish is not always distinct, the intent of the damage award helps clarify whether the damage award is compensatory or punitive.¹³⁷ While compensatory damages compensate an actual injury or loss and deter future misconduct, punitive damages punish

132. See *Sherrod v. Berry*, 629 F. Supp. 159, 162 (N.D. Ill. 1985) (discussing police officer's prior misconduct).

133. See *id.* (discussing city authorities' failure to discipline police officer for past misconduct).

134. See *id.* (discussing city authorities' refusal to discipline police officer after officer killed Sherrod.)

135. See *id.* at 159-60 (noting that jury verdict in *Sherrod* was against all defendants, including police officer, police chief, and City of Joliet).

136. See *Flannery v. United States*, 718 F.2d 108, 110-11 (4th Cir. 1983), *cert. denied*, 467 U.S. 1226 (1984). In *Flannery*, the United States Court of Appeals for the Fourth Circuit considered the propriety of a \$1,300,000 lower court damage award for a comatose plaintiff's "loss of the ability to enjoy life." *Id.* An automobile collision with a federal employee on official government business rendered the plaintiff in *Flannery* permanently comatose. *Id.* at 110. The plaintiff's personal representative brought the action on behalf of the comatose plaintiff under the Federal Tort Claims Act (FTCA). *Id.*; see 28 U.S.C. § 1346 (1982) (providing for tort claims against federal government officials). Under the FTCA, the law of the state in which the cause of action arose controls damage remedies. 28 U.S.C. § 2672 (1982). The FTCA, however, prohibits punitive damages. *Id.* at § 2674 (1982); see *Flannery*, 718 F.2d at 110-11 (noting that FTCA prohibits punitive damages). The Fourth Circuit held that while West Virginia law allowed damages for loss of the ability to enjoy life, such damages were punitive and, therefore, invalid under the FTCA. *Id.* at 111. The *Flannery* court reasoned that the comatose plaintiff was unable to enjoy the benefits of the damage award and that the award eventually would constitute a windfall to the plaintiff's estate upon the plaintiff's death. *Id.* The Fourth Circuit noted that because the plaintiff could not enjoy the benefits of the award, the damage award was punitive. *Id.*

The dissent in *Flannery* argued that the majority misconstrued the definition of punitive damages. *Id.* at 114-15 (Hall, J., dissenting). The dissent noted that the purpose of punitive damages is to exact retribution for or punish particularly wilful or malicious tortfeasors. *Id.* The *Flannery* dissent concluded that damages for loss of the ability to enjoy life were for an actual injury and were, therefore, outside the scope of punitive damages. *Id.*; see *infra* text accompanying notes 137-39 (discussing punitive damages).

137. See *infra* note 138 and accompanying text (discussing punitive damages).

a wrongdoer for a wrongdoer's misconduct.¹³⁸ The importance of the difference between compensatory and punitive damages is not only that *Carey* mandates that compensation is the primary purpose of section 1983 damages, but also that municipalities are immune from punitive damage awards in section 1983 actions.¹³⁹ By emphasizing deterrence rather than compensation in awarding loss of life damages, the district court in *Roman* ignored the *Carey* standard that compensation is the purpose of section 1983 damages.¹⁴⁰ Further, the *Roman* court's emphasis on deterrence focused on the wrongdoer's conduct, not the decedent's loss. The loss of life damages in *Roman*, appear punitive in nature, thus conflicting with the compensatory purpose of section 1983 damages and freeing the municipality from liability.¹⁴¹ Similarly, the *Bell* court stressed deterrence in awarding loss of life and loss of the enjoyment of living damages.¹⁴² Hedonic damages, however, focus on the decedent's loss, rather than the wrongdoer's conduct.¹⁴³ In awarding hedonic damages, therefore, federal courts should follow *Sherrod* and focus on the hedonic value of the decedent's life, not the wrongdoer's conduct.¹⁴⁴

Admittedly, federal courts may experience some difficulty in translating the hedonic value of a person's life into monetary terms for a damage

138. See *Milwaukee & St. Paul R.R. v. Arms*, 91 U.S. 489, 493 (1875) (defining punitive damages as damages for sake of public example for tortfeasors acting particularly wilfully, intentionally, or with an "evil motive"); *Kalavity v. United States*, 584 F.2d 809, 811 (6th Cir. 1978). In *Kalavity*, the United States Court of Appeals for the Sixth Circuit differentiated between ordinary tort damages, which compensate and deter, and punitive damages, which punish. *Id.* The *Kalavity* court stated that the deterrence effects of compensatory tort damages do not render the damages punitive in nature. *Id.* The court defined punitive damages as a form of retribution against a tortfeasor. *Id.* The *Kalavity* court, therefore, recognized the difference between the deterrence effect of compensatory damages and the retributive purpose of punitive damages. *Id.*

139. See *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981) (municipalities are immune from punitive damages in § 1983 actions); *Carey v. Phipus*, 435 U.S. 247, 254-55 (1978) (compensation is basic purpose of § 1983 remedies); see also *supra* text accompanying notes 16-23 (discussing *Carey* standard that compensation is basic purpose of § 1983 damages).

140. See *Roman v. City of Richmond*, 570 F. Supp. 1554, 1556-58 (N.D. Cal. 1983) (awarding deterrent damages for decedent's loss of life); *supra* text accompanying notes 72-78 (discussing deterrent damage award in *Roman*).

141. See *Roman*, 570 F. Supp. at 1556-58 (allowing jury to consider deterrence effect damages for decedent's loss of life have on municipal officers unlawful conduct).

142. See *Bell v. City of Milwaukee*, 746 F.2d 1205, 1265-66 (7th Cir. 1984) (intimating deterrent effect of damages for loss of life and loss of enjoyment of life damages); *supra* text accompanying notes 56-62 (discussing loss of life and loss of enjoyment of life damages in *Bell*).

143. See *Sherrod v. Berry*, 629 F. Supp. 159,162-64 (N.D. Ill. 1985) (discussing and defining hedonic damages); *supra* text accompanying notes 79-99 (discussing hedonic damages award in *Sherrod*).

144. See *Sherrod*, 629 F. Supp. at 162-64 (defining purpose of hedonic damages); *supra* text accompanying notes 79-99 (discussing hedonic damage award in *Sherrod*).

award.¹⁴⁵ The English courts' experience with loss of expectation of life damages provides insight into the difficulty of placing a value on human life.¹⁴⁶ Federal courts, however, can find guidance in assessing hedonic damages from *Sherrod* and other federal courts that have awarded loss of life and loss of the pleasure of living damages, as well as any state courts that award similar damages.¹⁴⁷ Moreover, in the United States a jury is the predominant trier of fact, and the amount that a decedent's estate receives for the hedonic value of the decedent's life is a fact that normally a jury will determine.¹⁴⁸ A jury assesses damages from personal knowledge, expert testimony, and the court's jury instructions.¹⁴⁹ Just as courts require the jury to assess damages for such intangible losses as pain and suffering or loss of a decedent's love and affection, the jury can determine the hedonic value of a decedent's life.¹⁵⁰

In determining the hedonic value of a decedent's life, the expert testimony of an economist can aid a jury in assessing the hedonic value of a decedent's life.¹⁵¹ Although the economist's testimony in *Sherrod* placed the hedonic value of a person's life far in excess of the eventual jury award, the economist's testimony reflected various methods that economists employ to value human life.¹⁵² Expert economic testimony concerning the hedonic value of a person's life, therefore, might provide a jury with the definition of the term "hedonic value of life" and offer the jury some basis for conceptualizing the value of a person's life.¹⁵³

The \$1,200,000 to \$12,000,000 range that the economist in *Sherrod* propounded as economic estimates for the value of life might disturb critics of excessive damage verdicts.¹⁵⁴ The loss of life and loss of the pleasure of

145. See *supra* notes 69-70, 94-99 and accompanying text (providing methods of determining value of life).

146. See *supra* notes 30-44 and accompanying text (discussing English courts' experience with loss of expectation of life damages).

147. See *Sherrod*, 629 F. Supp. at 162-64 (discussing economist's role in enabling jury to determine hedonic value of decedent's life); *supra* text accompanying notes 48-99 and accompanying text (discussing various courts' loss of life damage awards).

148. See C. McCORMICK, *supra* note 114, at 24-28 (discussing evolution of role of jury in determining damages); 2 S. SPEISER, *supra* note 12, at § 9:2 (discussing jury's discretion in awarding damages).

149. See C. McCORMICK, *supra* note 114 at 24-28 (discussing jury findings based on personal knowledge of jurors); 2 S. SPEISER, *supra* note 12, at § 9:2 (noting that jury assesses damages using good sense and following instructions of court).

150. See *supra* notes 103-06 and accompanying text (discussing jury awards for intangible losses such as pain and suffering).

151. See *Sherrod*, 629 F. Supp. at 162-64 (discussing economist's testimony in *Sherrod*).

152. See *id.* (discussing economist's testimony in *Sherrod*); *supra* note 96 (discussing economic studies of value of life).

153. See *Sherrod*, 629 F. Supp. at 162-64 (discussing economist's definition of hedonic value of life and methods economists' employ to value human life).

154. See Record at 55-61, *Sherrod* (recording economist's testimony in *Sherrod*); Willard & Davidson, *Does the Tort System Need An Overhaul?* 72 A.B.A.J. 36, 36-37 (July, 1986) (debating need for tort reform); Houser & Pearlman, *Should Pain and Suffering Awards Have Statutory Limits?*, 72 A.B.A.J. 34, 34 (May, 1986) (discussing debate over limitations on pain and suffering awards).

living damage verdicts that some federal courts have allowed, however, range from \$100,000 to \$850,000.¹⁵⁵ These awards fall far short of economists' estimates of the value of life, and exhibit courts' and juries' restraint in assessing a potentially tremendous award. An arbitrary cap on hedonic damages similar to the arbitrary figure that English courts established for loss of expectation of life damages, therefore, is unnecessary.¹⁵⁶ In addition, since section 1983 actions that arise when a wrongdoer deprives a decedent of life usually involve some egregious conduct, an arbitrary damage cap on hedonic damages might cause juries randomly to award the maximum amount that some arbitrary cap might allow as punishment for the wrongdoer, without analyzing subjectively the hedonic value of the decedent's life for a compensatory award. Thus, an arbitrary cap on hedonic damages would undermine the role of the jury and potentially distort the compensatory nature of hedonic damages. The unresolved and perhaps unwarranted controversy surrounding tort damages should not interfere with the compensation that hedonic damages afford a decedent's estate for a decedent's loss of life and loss of the pleasure of living when a wrongdoer unconstitutionally causes the decedent's death. Hedonic damages are an extremely important addition to section 1983 remedies. Federal courts not only have the authority, but also the obligation to adopt section 1983 remedies that will ensure compensation for deprivations of individuals' constitutional rights. Although no amount of compensation can restore life to a decedent, hedonic damages are completely in accord with other money damages Anglo-American law recognizes as appropriate when a wrongdoer causes a person to suffer injury or death.

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155. See *supra* notes 56-99 and accompanying text (discussing loss of life and loss of pleasure of living verdicts in § 1983 actions).

156. See *supra* text accompanying notes 34-39 (discussing English courts' assessing loss of expectation of life damages at conventional nominal sum).

